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MURRAY & ROBERTS AUSTRALIA PTY LTD v. EARTH SUPPORT COMPANY (SEA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC(ARB)-42-09-2014]
2 MARCH 2015

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ARBITRATION: *Award – Foreign award – Application to recognise foreign award as binding and enforcement of award as judgment against defendant – Originating summons ('OS') – Whether OS complied with procedural requirements – Whether intitulement in OS failed to mention which rule was being relied on by plaintiff – Whether such failure a mere irregularity – Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), O. 7 r. 2(1A), O. 69*

C

ARBITRATION: *Enforcement – Foreign award – Breach of supply agreement – Plaintiff referred claim for rectification cost to Australian Arbitration – Awards granted from Australian Arbitrator – Originating summons ('OS') filed for recognition and enforcement of foreign award as judgment against defendant – Whether plaintiff required to register and enforce Australian Arbitral award in Australia before filing OS – Whether court had jurisdiction to recognise and enforce foreign arbitral awards – Whether there was any grounds of refusal – Arbitration Act 2005, ss. 38 & 39*

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CIVIL PROCEDURE: *Originating Summons – Striking out – Ex parte application – Whether court could direct ex parte application to be heard inter partes*

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The plaintiff, an Australian proprietary company and Marine & Civil Construction Pty Ltd ('MCC'), an Australian proprietary company, entered into a joint venture agreement ('JVA'). Pursuant to the JVA, the plaintiff and MCC formed an unincorporated joint venture named Murray & Roberts-Marine & Civil JV ('JV Entity'). On 16 November 2010, the JV Entity entered into a supply agreement ('supply agreement') with the defendant, a private limited company incorporated in Malaysia. Subsequently, the plaintiff and MCC entered into a deed of release and discharge wherein the parties agreed to dissolve the JV Entity and terminate the JVA. Thereafter, the plaintiff took full control of the business of the JV Entity. The plaintiff alleged that the defendant had breached the supply agreement and consequently, the plaintiff had to carry out extensive rectification work. As such, the plaintiff claimed the cost of rectification work amounting to RM696,675.34. The plaintiff's claim was referred to the Australian Arbitrator. The Australian Arbitration had awarded four awards to the plaintiff ('four Australian arbitral awards'). The defendant had not only had failed to attend the arbitration proceedings before the Australian Arbitrator ('Australian Arbitration Proceedings') but had filed a suit in the Kuala Lumpur High Court ('NCC 2 court'), against, *inter alia*, the plaintiff ('defendant's suit'), and had applied for, among others, (i) a declaration that

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the defendant was not a party to the agreement in question and was not bound in any manner to accede to the plaintiff's request for the Australian Arbitration Proceedings; and (ii) a declaration that the defendant was entitled to challenge the jurisdiction of the Australian Arbitrator. The defendant's suit was dismissed by NCC 2 court on the grounds, *inter alia,* that the seat of arbitration was in Western Australia, as such any challenge to the Australian Arbitrator's jurisdiction should be done in the Western Australian courts. In the present case, the plaintiff, by way of an *ex parte* originating summons in encl. 1 ('OS') pursuant to s. 38 of the Arbitration Act 2005 ('AA'), O. 69 of the Rules of Court 2012 ('ROC') and/or the court's inherent jurisdiction sought, among others, for an order that the following four Australian arbitral awards between the plaintiff and defendant made by the Australian Arbitrator be recognised as binding and be enforced in the same manner as a judgment against the defendant. The defendant, on the contrary, opposed the OS and filed an application to strike out the OS *vide* encl. 4 ('defendant's striking out application'). Since the plaintiff had notified the defendant of the OS and extended a copy of the OS as a matter of courtesy to the defendant, the defendant was present at the *ex parte* hearing of the OS. As such, the OS was heard *inter partes* together with the defendant's striking out application. The defendant forwarded three contentions to persuade this court not to recognise and/or enforce the Australian arbitral awards, *ie*, (i) the Australian Arbitrator lack of jurisdiction; (ii) defendant's liability and quantum of damages had not been proved by the plaintiff; and (iii) the plaintiff had failed to mitigate its loss. The defendant further alleged that the intitulement of the OS did not disclose a reasonable cause of action pursuant to O. 7 r. 3 of the RC and did not provide jurisdiction for the present court to grant the relief applied for by the plaintiff. Also, relying on O. 69 r. 9 of the ROC, the defendant contended that the plaintiff should have registered and enforced the Australian arbitral awards in Australia before filing the OS. Further, the defendant contended that since the plaintiff had filed an *ex parte* OS, the requirement under O. 7 r. 2(1A) of the ROC ought to be complied with. The defendant contended that the intitulement of the OS did not state which particular rule of O. 69 of the ROC was relied on by the plaintiff, thus, such omission had prejudiced the defendant. As a result, the OS could not be sustained and should be struck out. The issues that arose for the court's determination *inter alia* were (i) whether the court could direct *ex parte* application to be heard *inter partes*; (ii) whether the plaintiff was required to register and enforce Australian arbitral awards in Australia before filing the OS; (iii) whether the OS had complied with O. 7 r. 2(1A) of the ROC; (iii) whether the OS had contravened O. 7 r. 3(1) of the ROC; (iv) whether the court had jurisdiction to recognise and enforce foreign arbitral awards; (v) whether the plaintiff had fulfilled the formal requirements to recognise and enforce the Australian arbitral awards; and (vi) whether the defendant could rely on any one of nine grounds of refusal stipulated in s. 39(1)(a)(i) to (vii).

Held (allowing encl. 1; dismissing encl. 4 with costs):

(1) Pursuant to O. 69 r. 8(1) of the ROC, the court had the discretionary power to convert an *ex parte* OS to an *inter partes* application. Order 69 r. 8(1) of the ROC is not couched in mandatory terms. Order 69 r. 8(1) of the ROC uses the permissive term 'may'. Order 69 r. 8(4) of the ROC provides that the court 'may specify parties to the arbitration on whom' the OS 'shall be served'. It was clear that O. 69 r. 8(4) of the ROC conferred a discretionary power on the court to direct the plaintiff to serve the OS on parties to the arbitration in question. The OS was not an application wherein secrecy was essential and if the OS was heard *inter partes*, the purpose of the OS will not be defeated. On the facts of the case, the defendant not only appeared at the first hearing date of the OS but the defendant's striking out application had also been filed. Accordingly, it would be expeditious and economical to hear the OS on an *inter partes* basis together. (paras 23 & 24)

(2) The phrase 'as far as applicable' in O. 18 r. 19(3) of the ROC showed that O. 18 r. 19(1) of the ROC should not be applied indiscriminately to originating summons. Such a phrase allowed the court not to apply O. 18 r. 19(1)(a) of the ROC to originating summons when the application of O. 18 r. 19(1)(a) of the ROC may lead to an injustice or an absurdity. The purpose of s. 38 of the AA would be defeated if the OS was required to disclose a reasonable cause of action. Order 18 r. 19(1)(a) of the ROC should be construed with regard to the overriding interest of justice and in a manner which could achieve the court's overriding objective to deal with cases justly. (para 30)

(3) Order 69 r. 9 of the ROC provided that if an arbitral award from a country outside Malaysia, had 'become enforceable in the same manner as a judgment given by a court in that place', a party to the award may apply to enforce the award under O. 69 r. 8 of the ROC. If a party to an arbitral award from a foreign State wished to enforce the award in Malaysia, an application under O. 69 r. 8 of the ROC had to be made. Accordingly, there was no requirement for the plaintiff to register and/or enforce the Australian arbitral awards in Australia before filing the OS. (para 33)

(4) The intitulement did not mention which rule in O. 69 of the ROC was being relied on by the plaintiff in the OS. As such, the OS did not 'fully' comply with O. 7 r. 2(1A) of the ROC. However, the plaintiff correctly cited s. 38 of the RC in the intitulement as the 'written law under which the court is being moved' as required by O. 7 r. 2(1A) of the ROC. Such a partial non-compliance with O. 7 r. 2(1A) of the RC was a mere irregularity which could be cured under O. 1A read with O. 2 r. 1(1) and (2) of the ROC. Therefore, there was no room for any surprise or confusion to the defendant due to the plaintiff's omission and the

defendant was not prejudiced by the plaintiff's omission. As such, the OS was not scandalous, frivolous or vexatious and an abuse of court process. In the circumstances, this court was constrained to dismiss the defendant's striking out application with costs. (para 39)

(5) In deciding whether to recognise and enforce foreign arbitral awards under ss. 38 and 39 of the AA, the court was merely an enforcement court which did not exercise any supervisory jurisdiction or power over foreign arbitral awards. Only the courts of the country which was designated the seat of arbitration had supervisory jurisdiction and power over the arbitral award in question. In this case, the defendant had not applied to the Australian court to set aside the Australian arbitral awards. Furthermore, the defendant's suit has been filed in this country in respect of the Australian arbitral awards and the defendant's suit had been subsequently dismissed by the NCC 2 Court. As such, no resort to the court's inherent jurisdiction was necessary or desirable, especially in light of a 'minimalist' judicial intervention approach embodied in s. 8 of the AA. (paras 52 & 53)

(6) Section 8 of the AA provides for a 'minimalist' approach by courts whereby judicial intervention in arbitral matters is only allowed if it is so provided in AA. If a ground is not provided in s. 39(1)(a) and (b) of the AA, the defendant could not thus rely on such a ground. The burden to prove any of the seven grounds in s. 39(1)(a)(i) to (vii) of the AA was with the defendant. The onus of proof now shifts to the defendant who opposes the recognition and enforcement of this arbitration award to satisfy the court why the award should not be registered and enforced. If the defendant is unable to discharge such a legal burden, the court had no discretion but to recognise and enforce the Australian arbitral awards under s. 38(1) of the AA. (paras 62 & 65)

(7) The defendant's three contentions do not fall within any of the nine grounds of refusal. The nine grounds of refusal are exhaustive under s. 39(1)(a) and (b) of the AA. Accordingly, the defendant's three contentions to refuse recognition and enforcement of the Australian arbitral awards are not accepted because the present court did not possess any supervisory jurisdiction and power under AA to inquire into the validity and correctness of the Australian arbitral awards. Thus, the defendant should have applied to the Australian courts to review and challenge the validity and correctness of the Australian arbitral awards based on the defendant's three contentions. However, the defendant's suit was filed in Malaysia and not in Australia. As such, the dismissal of the defendant's suit had been rightly made. (paras 67 & 68)

(8) The issue regarding the Australian Arbitrator's lack of jurisdiction did not persuade the court to refuse recognition and/or enforcement of the Australian arbitral awards. The court could not consider the merits of the Australian arbitral awards, nor could the court allow the defendant

A to raise any issue which the defendant could have raised before the Australian Arbitrator or the Australian supervisory courts. The issues regarding the defendant's liability and extent of liability as well as the plaintiff's alleged failure to mitigate loss, concerned the merits of the Australian arbitral awards which this court could not consider. Therefore, the present court was bound to give permission to the plaintiff to enforce the Australian arbitral awards. (paras 69)

Case(s) referred to:

Agrovenus LLP v. Pacific Inter-Link Sdn Bhd & Another Appeal [2014] 4 CLJ 525 CA ***(refd)***

Aloe Vera of America Inc v. Asianic Food (S) Pte Ltd & Anor [2006] 3 SLR (R) 174 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cairn Energy India Pty Ltd & Anor v. The Government of India [2010] 2 CLJ 420 CA ***(dist)***

Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors [2013] 1 LNS 574 CA ***(refd)***

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Chin Wai Hong & Anor v. Lim Guan Hoe & Anor [2014] 1 LNS 859 HC ***(refd)***

Datuk Haji Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii & Ors [2012] 1 LNS 1349 HC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Honeywell International Middle East Ltd v. Meydan Group LLC (formerly Meydan LLC) [2014] Bus LR Digest D13 ***(refd)***

Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd [2001] 1 CLJ 132 HC ***(refd)***

International Bulk Carriers SPA v. CTI Group Inc [2014] 8 CLJ 854 CA ***(dist)***

Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 HC ***(refd)***

Kanciltek (M) Sdn Bhd v. Mayban Finance Bhd (No 1) [2001] 6 CLJ 254 HC ***(dist)***

Kitnasamy s/o Marudapan v. Nagatheran s/o Manogar & Anor [2000] 2 SLR 598 ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***

Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd [2013] 8 CLJ 655 HC ***(refd)***

Letang v. Cooper [1965] 1 QB 232 ***(refd)***

Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(refd)***

Maimunah Deraman v. Majlis Perbandaran Kemaman [2011] 9 CLJ 689 HC ***(dist)***

Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***

Malayan Banking Bhd v. Koay Kang Chuwan & Anor [2010] 6 CLJ 172 CA ***(refd)***

Muniandy Subrayan & Ors v. Chairman and Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***

Open Type Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd [2012] 1 CLJ 323 HC ***(refd)***

Paramasivam Karuppannr Gounder v. PT Synergy Oil Nusantara, Indonesia [2014] 2 AMCR 937 ***(dist)***

Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd [1996] 1 LNS 119 HC ***(refd)***

PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***

Salutary Avenue (M) Sdn Bhd v. Malaysia Shipyard and Engineering Sdn Bhd & Anor [1999] 7 CLJ 514 HC ***(refd)***
Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 CA ***(refd)***
SDA Architects v. Metro Millenium Sdn Bhd [2014] 3 CLJ 632 CA ***(refd)***
Sing Hoe Motor Company Ltd v. Public Prosecutor [1968] 1 LNS 142 HC ***(refd)***
Smartframe Sdn Bhd v. Anjung Bahasa Sdn Bhd [2009] 3 CLJ 189 HC ***(dist)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***
Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao Peoples's Democratic Republic [2014] 1 LNS 525 CA ***(dist)***
Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***
Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV [2013] 3 CLJ 294 HC ***(dist)***
Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd [2010] 2 CLJ 541 CA ***(dist)***

Legislation referred to:
Arbitration Act 1952, s. 27
Arbitration Act 2005, ss. 8, 18(8), 37(1), 38(1), (2)(a), (b), (3), (4), 39(1)(a)(i), (ii), (iii), (iv), (b)(i), (ii), 41(3), (4), 42(1), 50
Arbitration (Amendment) Act 2011, s. 8
Road Traffic Ordinance 1958, s. 92(1), (4)
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), O. 7 rr. 2(1A), 3(1), 7(1), O. 18 r. 19(1)(a), (b), (c), (d), (3), O. 69 rr. 8(1), (2)(a), (b), (3), (4), (7)(a), (b), (8), (10), 9, O. 92 r. 4

Arbitration Act 1996 [UK], s. 103(2)(a), (b), (c), (d), (e), (f), (3)
International Arbitration Act [Sing], s. 31(1)
Rules of Court [Sing], O. 7 r. 3(1)

For the plaintiff - Sabarina Samadi (Ng Chia How with her); M/s Zaid Ibrahim & Co
For the defendant - Rajinder Singh; M/s Rajinder & Goh

Reported by S Kahvitha

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This judgment discusses whether the plaintiff company (plaintiff) may apply to this court under s. 38(1) of the Arbitration Act 2005 (AA) to recognise as binding and to enforce as a judgment against the defendant company (defendant), a total of four interim and final arbitral awards (Australian Arbitral Awards) by a sole Western Australian arbitrator, Mr Matthew Zilko SC (Australian Arbitrator).

[2] The peculiar feature of this case is that the defendant has not only failed to attend the arbitration proceedings before the Australian Arbitrator (Australian Arbitration Proceedings) but the defendant has also filed a suit in Kuala Lumpur High Court NCC No. 2 (NCC 2 Court), Civil Suit

No: 24NCC(ARB)-8-02-2014 against, among others, the plaintiff (defendant's suit), and has applied for, among others, a declaration that the defendant is not a party to the agreement in question and is not "bound in any manner to accede to the" plaintiff's request for the Australian Arbitration Proceedings.

Parties

[3] The plaintiff is an Australian proprietary company limited by shares with a registered office in Perth, Western Australia.

[4] The defendant is a private limited company incorporated in Malaysia with a registered and business address in Petaling Jaya, Selangor Darul Ehsan.

[5] The plaintiff and "Marine & Civil Construction Pty Ltd" (MCC), an Australian proprietary company, entered into a joint venture agreement (JVA).

[6] Pursuant to the JVA, the plaintiff and MCC formed an unincorporated joint venture named Murray & Roberts-Marine & Civil JV (JV entity).

Background

[7] On 16 November 2010, the JV entity entered into a supply agreement with the defendant (supply agreement).

[8] The plaintiff exercised "step-in rights" under the JVA to assume control over the JV entity.

[9] On 8 February 2011, the plaintiff and MCC entered into a "deed of release and discharge" wherein the parties agreed to dissolve the JV entity and terminate the JVA. Thereafter, the plaintiff took full control of the business of the JV entity and continued that business.

[10] The plaintiff alleged that the defendant had breached the supply agreement and consequently, the plaintiff had to carry out extensive rectification work (rectification work). The plaintiff claimed the cost of rectification work amounting to RM696,675.34 (plaintiff's claim).

[11] The plaintiff's claim was referred to the Australian Arbitrator.

[12] Messrs Rajinder & Goh (Messrs RG) is a firm of solicitors who represent the defendant in the Australian Arbitration Proceedings and in Malaysia. Messrs RG wrote to the Australian Arbitrator by way of a letter dated 27 January 2014 (which was copied to the plaintiff's solicitors in Australia) requesting for a preliminary point to be decided by the High Court of Malaya on whether the defendant was bound to arbitrate a dispute with the plaintiff when the plaintiff was not a party to the supply agreement (which contained the arbitration clause) (defendant's preliminary matter).

[13] Both the Australian Arbitrator and the plaintiff disagreed for the defendant's preliminary matter to be decided by the High Court of Malaya.

[14] By way of a letter dated 29 January 2014 from Messrs RG to the Australian Arbitrator (which was copied to the plaintiff's Australian solicitors), Messrs RG stated, among others:

(a) Messrs RG had instructions from the defendant "to take no further part" in the Australian Arbitration Proceedings;

(b) the issue of the plaintiff's standing, namely the plaintiff was not a party to the supply agreement, was the basis for the challenge to the jurisdiction of the Australian Arbitrator; and

(c) until the issue of the jurisdiction of the Australian Arbitrator had been determined, the defendant was "not obliged nor bound to progress this particular issue" through the Australian Arbitrator.

Defendant's Suit

[15] On 7 February 2014, the defendant's suit was filed against the following four parties:

(a) the JV entity;

(b) MCC;

(c) Murray & Roberts Pty Ltd (MRPL); and

(d) the plaintiff. The plaintiff is a wholly owned subsidiary of MRPL.

[16] In the defendant's suit, the defendant applied for, among others:

(a) a declaration that the defendant was entitled to challenge the jurisdiction of the Australian Arbitrator;

(b) a declaration that the foreign jurisdiction of Western Australia to hear and determine a dispute falling within the terms of the supply agreement was a jurisdiction that bound the defendant, JV entity and/or MCC;

(c) a declaration that the plaintiff was not a party to the supply agreement and the defendant was not bound in any manner whatsoever to accede to the plaintiff's request or claim to arbitrate in terms of the supply agreement;

(d) a declaration that despite the plaintiff's disagreement, the defendant was entitled pursuant to s. 41(3) AA to a determination of the following questions of law, within the local jurisdiction of the High Court of Malaya, namely:

(i) whether the defendant was entitled to initiate the defendant's suit and pray for relief in the defendant's suit despite the plaintiff's residence outside the jurisdiction of the High Court of Malaya; and

A (ii) whether the defendant was bound to arbitrate a dispute in terms of the supply agreement with the plaintiff when the plaintiff was not a party to the agreement;

(e) a declaration that the plaintiff was not entitled to continue with the Australian Arbitration Proceedings in terms of s. 41(4) AA until the B hearing and disposal of the defendant's suit; and

(f) an order that all further Australian Arbitration Proceedings be stayed until further order of NCC 2 Court.

[17] The defendant's suit was dismissed by NCC 2 Court (dismissal of C defendant's suit) on the following grounds, in brief:

(a) the seat of arbitration is in Western Australia. Any challenge to the Australian Arbitrator's jurisdiction should have been made in the Western Australian courts and not in a Malaysian court; and

D (b) the Australian Arbitrator had decided that he had jurisdiction to determine the Australian Arbitration Proceedings and as such, NCC 2 Court would not interfere with such a decision.

[18] The defendant lodged an appeal to the Court of Appeal against the dismissal of defendant's suit but this appeal was subsequently withdrawn by E the defendant.

This Suit

[19] In this case, the plaintiff applies by way of an *ex parte* originating summons in court encl. no. 1 (OS) pursuant to s. 38 AA, O. 69 of the Rules F of Court 2012 (RC) and/or the court's inherent jurisdiction (I will discuss later in this judgment on whether it is appropriate for the plaintiff to rely on the court's inherent jurisdiction) for the following orders, among others:

(a) the following four Australian Arbitral Awards between the plaintiff and defendant made by the Australian Arbitrator be recognised as binding G and be enforced in the same manner as a judgment against the defendant:

(i) an interim award on jurisdiction issue dated 28 February 2014;

(ii) an interim award on costs of jurisdiction issue dated 17 April 2014;

(iii) final award dated 22 April 2014; and

H (iv) final award on costs dated 5 June 2014;

(b) judgment in terms of the four Australian Arbitral Awards be entered against the defendant upon the expiry of 14 days from the service of the order to be made against the defendant;

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(c) interest at the rate of 5% per annum on the sums in terms of the four Australian Arbitral Awards from the date of judgment to the date of full settlement; and

(d) costs of and incidental to the OS be paid by the defendant to the plaintiff.

[20] The plaintiff filed an *ex parte* OS but on the first date of hearing of the OS:

(a) the defendant's learned counsel was present to oppose the OS. The defendant's learned counsel informed the court that the defendant had filed an application to strike out the OS in court encl. no. 4 (defendant's striking out application);

(b) the plaintiff's learned counsel informed the court that the defendant's solicitors had requested the plaintiff's solicitors to notify the defendant's solicitors of the OS and as a matter of courtesy, the plaintiff's solicitors had extended to the defendant's solicitors a copy of the cause papers in respect of the OS. This explained the presence of the defendant's learned counsel at the *ex parte* hearing of the OS; and

(c) I directed the OS to be heard *inter partes* together with the defendant's striking out application.

Can Court Direct *Ex Parte* Application To Be Heard *Inter Partes*?

[21] The plaintiff's learned counsel has contended that the OS should be heard *ex parte* under O. 69 r. 8(1) RC based on the following cases:

(a) the partially dissenting judgment of Mohd Hishamudin JCA in the Court of Appeal case of *Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd* [2010] 2 CLJ 541; [2010] 3 MLJ 459, at p. 485; and

(b) the unreported High Court's decision in *Datuk Haji Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii & Ors* [2012] 1 LNS 1349, Companies (Winding Up) No. KCH-28-13/3/-2012, at pp. 3-4.

Based on the above authorities, the plaintiff submits that notwithstanding the delivery of the cause papers of the OS to the defendant's solicitors, the OS remains an *ex parte* application and the defendant is not entitled to file any affidavit to oppose the OS.

[22] Order 69 r. 8 RC provides as follows:

Enforcement of awards

8(1) *An application for permission to enforce an award in the same manner as a judgment or an order may be made without notice in an arbitration claim originating summons.*

(2) The arbitration claim originating summons shall

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(a) state the name and the usual or last known place of abode or business of the applicant, and the respondent against whom it is sought to enforce the award, respectively; and

(b) state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

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(3) The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including exhibiting the original arbitration agreement and the duly authenticated original award or, in either case, a duly certified copy thereof and where the award or agreement is in a language other than the national language or English, a translation of it in the English language, duly certified as a correct translation by a sworn translator or by an official or by a diplomatic or consular agent of the country in which the award was made.

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(4) *The Court may specify parties to the arbitration on whom the arbitration claim originating summons shall be served.*

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(5) With the permission of the Court, the arbitration claim originating summons may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.

(6) An order giving permission to enforce the award shall

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(a) be drawn up by the applicant; and

(b) be served on the respondent by

(i) delivering a copy to him personally; or

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(ii) sending a copy to him at his usual or last known place of residence or business.

(7) *Within fourteen days after service of the order giving permission to enforce the award or, if the order is to be served out of the jurisdiction, within such other period as the Court may set –*

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(a) *the respondent may apply to set aside such order; and*

(b) *the award shall not be enforced until –*

(i) *after the expiration of that period; or*

(ii) *if the respondent applies within that period to set aside, until after the application made by the respondent has been finally disposed of.*

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(8) *The order giving permission for enforcement shall contain a statement of the right to make an application to set aside the order.*

(9) Where a body corporate is a party, any reference in this rule to a place of residence or business shall have effect as if the reference were to the registered or principal address of the body corporate.

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(10) *Where the award sought to be enforced is in the nature of an interim injunction under subsection 13(6) of the 1952 Act or subsection 19(1) of the 2005 Act, the order shall be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages. The order shall be enforceable immediately, and subparagraph (7)(b) shall not apply.*

(emphasis added)

[23] It is clear that O. 69 r. 8(1) RC provides that the OS "may be made without notice". I am of the considered view that despite O. 69 r. 8(1) RC, the court has the discretionary power to convert an *ex parte* OS to an *inter partes* application. My view is based on the following reasons:

(a) Order 69 r. 8(1) RC is not couched in mandatory terms. Order 69 r. 8(1) RC uses the permissive term "may". In *Sing Hoe Motor Company Ltd v. Public Prosecutor* [1968] 1 LNS 142; [1968] 2 MLJ 54, at pp. 54-55, Raja Azlan Shah J (as His Royal Highness then was) in the High Court held that s. 92(4) of the then Road Traffic Ordinance 1958 (RTO) did not provide for mandatory forfeiture of a car following the conviction of the car's hirer under s. 92(1) RTO because of, among others, the existence of the word "may" in s. 92(4) RTO;

(b) Order 69 r. 8(4) RC provides that the court "may specify parties to the arbitration on whom" the OS "shall be served". It is clear that O. 69 r. 8(4) RC confers a discretionary power on the court to direct the plaintiff to serve the OS on parties to the arbitration in question; and

(c) in *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17, at p. 18, Chang Min Tat FJ in delivering the Federal Court's judgment, held as follows:

> Next, so far as the court is concerned, the Bank on December 30, 1978 applied for leave, as required by Order 42 rule 23, Rules of the High Court, 1957 (now Order 46 rule 2(1)(a) Rules of the High Court, 1980), to levy execution, since 6 years had elapsed from the judgment. It did not do so *ex parte* as it was entitled to do, though of course the court had at all times the power to order service on the defendant. To that *inter partes* summons, the defendant filed an affidavit in reply.
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> (emphasis added)

[24] I exercised my discretion to hear the OS on an *inter partes* basis due to the following reasons:

(a) the OS is not an application wherein secrecy is essential and if the OS is heard *inter partes*, the purpose of the OS will not be defeated. Applications wherein secrecy is essential, include applications for *Anton Piller* and *Mareva* orders – please see *Chin Wai Hong & Anor v. Lim Guan Hoe & Anor* [2014] 1 LNS 859; [2014] 5 AMR 427, at pp. 449-452; and

(b) in this case, the defendant's learned counsel not only appeared at the first hearing date of the OS but the defendant's striking out application had also been filed. Accordingly, it would be expeditious and economical to hear the OS on an *inter partes* basis together with the defendant's striking out application.

[25] *Westform Far East Sdn Bhd* and *Datuk Haji Mohammad Tufail Mahmud* may be distinguished from this case as follows:

(a) in *Westform Far East Sdn Bhd* and *Datuk Haji Mohammad Tufail Mahmud*, learned counsel for the opposing parties did not turn up at the hearing of the *ex parte* applications in question;

(b) the opposing parties did not apply to strike out the matters in question; and

(c) the learned High Court judges who heard the *ex parte* applications did not direct the *ex parte* applications to be heard *inter partes*.

Defendant's Striking Out Application

Court's Approach

[26] An OS may be struck out under O. 18 r. 19(1) read with (3) RC. Order 18 r. 19(3) RC provides as follows:

> Order 18 rule 19(3) *This rule [Order 18 rule 19] shall, as far as applicable, apply to an originating summons as if it were a pleading.*
>
> (emphasis added)

[27] Based on my interpretation of case law on striking out applications, I adopt the following approach:

(a) a pleading can only be struck out in a plain and obvious case, namely where that pleading is obviously unsustainable – the Supreme Court's judgment in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at 43;

(b) the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading - *Bandar Builder Sdn Bhd*, at p. 44; and

(c) for the purpose of the defendant's striking out application, the court will assume that the contents of the OS are true – the Court of Appeal's decision in *Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, at p. 679.

Is Plaintiff Required To Show Reasonable Cause Of Action?

[28] Prayer 1 of the defendant's striking out application alleges that the intitulement of the OS does not disclose a reasonable cause of action and does not provide jurisdiction for this court to grant the relief applied for by the plaintiff.

[29] In *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, at p. 67; [1988] 2 MLJ 12, at p. 19, Salleh Abas LP gave one of the three judgments of the majority decision of the Supreme Court and followed the meaning of the phrase "cause of action" given by Diplock LJ (as His Lordship then was) in the English Court of Appeal case of *Letang v. Cooper* [1965] 1 QB 232:

> What then is the meaning of "a cause of action?" *"A cause of action" is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action*. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p. 242 *defined "a cause of action" to mean "a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person". In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.*
>
> (emphasis added)

[30] The OS applies for the Australian Arbitral Awards to be recognised as binding and enforceable as a judgment against the defendant. The OS does not allege that the plaintiff's right has not been adversely affected or prejudiced by the defendant's act. Based on the meaning of "cause of action" given in *Letang* and followed in *Lim Kit Siang*, in applying to register and enforce the Australian Arbitral Awards, strictly speaking, the plaintiff does not have a cause of action. Having said that, I cannot accede to the defendant's striking out application based on O. 18 r. 19(1)(a) RC (on the ground that the OS does not disclose any reasonable cause of action). I decide as such for the following reasons:

(a) the phrase "as far as applicable" in O. 18 r. 19(3) RC shows that O. 18 r. 19(1) RC should not be applied indiscriminately to originating summonses. Such a phrase allows the court not to apply O. 18 r. 19(1)(a) RC to originating summonses when the application of O. 18 r. 19(1)(a) RC may lead to an injustice or an absurdity. I am of the considered view that the purpose of s. 38 AA (which provides an avenue for a party to apply to court to recognise and enforce arbitral awards where the seat of arbitration is in Malaysia or in a foreign country) will be defeated if the OS is required in this case to disclose a reasonable cause of action. As such, O. 18 r. 19(1)(a) RC cannot apply to the OS in this case;

(b) Order 18 r. 19(1)(a) RC should be construed with regard to the overriding interest of justice (as required by O. 1A RC) and in a manner which may achieve the court's overriding objective to deal with cases justly (O. 2 r. 1(2) RC). I refer to O. 1A and O. 2 r. 1(2) RC as follows:

Order 1A	*In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.*
Order 2 rule 1(2)	*These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.*

(emphasis added); and

(c) my research is not able to show any case in this country or in the common law countries wherein the court has struck out an application to register and enforce an arbitral award on the ground that such an application fails to disclose a reasonable cause of action.

Is Plaintiff Required To Register And Enforce Australian Arbitral Awards In Australia Before Filing OS?

[31] The defendant has contended that the plaintiff should have registered and enforced the Australian Arbitral Awards in Australia before filing the OS. Reliance was placed on O. 69 r. 9 RC. As such, according to the defendant, the OS "cannot be sustained" and should be struck out.

[32] Sections 38 and 39 AA as well as O. 69 r. 9 RC are reproduced as follows:

38(1) *On an application in writing to the High Court*, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or *an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.*

38(2) *In an application under subsection (1) the applicant shall produce –*

(a) *the duly authenticated original award or a duly certified copy of the award; and*

(b) *the original arbitration agreement or a duly certified copy of the agreement.*

38(3) *Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.*

38(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [*New York Convention*] adopted by the United Nations Conference on International Commercial Arbitration in 1958.

39(1) *Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked –*

(a) *where that party provides to the High Court proof that –*

(i) *a party to the arbitration agreement was under any incapacity;*

(ii) *the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;*

(iii) *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;*

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;*

(v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;*

(vi) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of [AA] from which the parties cannot derogate, or, failing such agreement, was not in accordance with [AA]; or*

(vii) *the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or*

(b) *if the High Court finds that –*

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or*

(ii) *the award is in conflict with the public policy of Malaysia.*

39(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Order 69 rule 9 *Where an award has, under the law in force in the place where it was made become enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8.*

(emphasis added)

[33] Reading together ss. 38 and 39 AA with O. 69 rr. 8 and 9 RC, there is no requirement, let alone a mandatory one, for the plaintiff to register and/or enforce the Australian Arbitral Awards in Australia before filing the OS. O. 69 r. 9 RC merely provides that if an arbitral award from a country outside Malaysia, has "become enforceable in the same manner as a judgment given by a court in that place", a party to the award may apply to enforce the award under O. 69 r. 8 RC. It is clear that if a party to an arbitral

award from a foreign state wishes to enforce the award in Malaysia, an application under O. 69 r. 8 RC has to be made. This is precisely what the plaintiff has done - the OS has been filed pursuant to O. 69 r. 8 RC. Accordingly, there is no requirement for the plaintiff to register and/or enforce the Australian Arbitral Awards in Australia before filing the OS.

Whether OS Has Complied With O. 7 r. 2(1A) RC?

[34] Order 7 r. 2(1A) RC provides as follows:

> 2(1A) *Every originating summons shall state in its intitulement any provision of these Rules and any provision of any written law under which the Court is being moved.*
>
> (emphasis added)

The plaintiff filed an *ex parte* OS but this court had directed the OS to be heard on an *inter partes* basis. Order 7 r. 7(1) RC has stated, among others, that O. 7 r. 2(1A) applies to *ex parte* originating summonses.

[35] The defendant contended that the intitulement of the OS (intitulement) did not state which particular rule of O. 69 RC was relied on by the plaintiff. The defendant further submitted that the defendant was prejudiced by such an omission because depending on which particular rule in O. 69 RC, "the defendant would be disentitled to attack the several" Australian Arbitral Awards. As such, according to the defendant, the OS should be struck out. The defendant cited the following cases (in the order these cases were presented in the defendant's written submission) in support of the above contention:

(a) the High Court case of *Smartframe Sdn Bhd v. Anjung Bahasa Sdn Bhd* [2009] 3 CLJ 189, at pp. 195-196 and 199;

(b) the High Court's decision in *Kanciltek (M) Sdn Bhd v. Mayban Finance Bhd (No 1)* [2001] 6 CLJ 254, at p. 259; and

(c) the Court of Appeal case of *Malayan Banking Bhd v. Koay Kang Chuwan & Anor* [2010] 6 CLJ 172, at pp. 188-189.

[36] The High Court in *Smartframe Sdn Bhd* and *Kanciltek (M) Sdn Bhd* followed the Court of Appeal case of *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127. In *Cheow Chew Khoon*, at p. 142, Gopal Sri Ram JCA (as His Lordship then was) in the Court of Appeal held as follows:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support one would come to the conclusion that it is not an application made under O. 89. *The summons does not, as I observed very early in this judgment state any particular Rule of Court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the Court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the Court should have to conduct a close examination of the supporting*

affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of Counsel be the law, then it is wrong. But I am firmly of the view that it is not.

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the Court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the Court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended.

(emphasis added)

[37] In *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83, at pp. 95-97, Hamid Sultan Abu Backer J (as His Lordship then was) held in the High Court that the plaintiff's failure in that case to cite the relevant sub-s. of ss. 37 and 42 AA, is fatal. The plaintiff applied unsuccessfully in *Taman Bandar Baru Masai Sdn Bhd* to set aside a domestic arbitral award but the defendant's application to recognise and enforce the same award, was allowed.

[38] I have perused the intitulement which stated, among others:

(a) ss. 38 and 50 AA. Section 50 AA provides that any application to the High Court under the AA shall be by way of an originating summons; and

(b) Order 69 RC. The intitulement did not mention which rule in O. 69 RC is being relied on by the plaintiff in the OS (plaintiff's omission).

[39] The OS did not "fully" comply with O. 7 r. 2(1A) RC because of the plaintiff's omission. I used the term "fully" because the plaintiff correctly cited s. 38 RC in the intitulement as the "written law under which the court is being moved" as required by O. 7 r. 2(1A) RC. Such a partial non-compliance with O. 7 r. 2(1A) RC by way of the plaintiff's omission:

(a) is a mere irregularity which can be cured under O. 1A read with O. 2 r. 1(1) and (2) RC. This is because the court "shall have regard to the overriding interest of justice"; and

(b) does not justify a striking out of the OS under O. 18 r. 19(1) RC.

The above decision is based on the following reasons:

(i) the reference to s. 38 AA in the intitulement will be sufficient to inform the defendant of the purpose, basis and effect of the OS;

(ii) the OS states in great detail the prayers and the grounds in support of the OS that the plaintiff is applying to this court to recognise and to enforce the Australian Arbitral Awards against the defendant. The purpose, basis and effect of the OS is accentuated by the detailed affidavit in support of the OS. There is therefore no room for any surprise or confusion to the defendant due to the plaintiff's omission; and

(iii) I am not able to see any prejudice caused to the defendant by the plaintiff's omission because:

(1) the intitulement has already mentioned s. 38 AA;

(2) rule 8 is the only rule in O. 69 RC regarding recognition and enforcement of foreign arbitral awards. Order 69 r. 9 RC also refers to O. 69 r. 8 RC. As explained above, the plaintiff is already bound by its own reference in the intitulement to s. 38 AA. There is therefore no other rule in O. 69 RC (other than r. 8) for the plaintiff to rely on subsequently so as "move goal posts" to the defendant's surprise and detriment; and

(3) prior to the filing of the OS, the defendant has instituted the defendant's suit in respect of the Australian Arbitral Awards and has proceeded with the hearing of the defendant's suit until the dismissal of defendant's suit. In view of the defendant's suit, the defendant cannot be said to be unprepared or has been caught by surprise by the plaintiff's omission.

[40] The cases relied on by the defendant (defendant's cases) may be distinguished from this matter on the following grounds:

(a) the defendant's cases do not concern an application under s. 38 AA;

(b) the plaintiff has stated s. 38 AA in the intitulement; and

(c) the defendant's cases have been decided before the introduction of O. 1A and O. 2 r. 1(2) RC.

Whether OS Has Contravened O. 7 r. 3(1) RC?

[41] Order 7 r. 3(1) RC reads as follows:

> 3(1) *Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.*
>
> (emphasis added)

[42] The following Court of Appeal cases have held that O. 7 r. 3(1) RC is a mandatory provision and its breach may be relied on to dismiss (and not merely to strike out) the OS: A

(a) in *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* [1998] 1 CLJ 1035, at pp. 1041-1042; [1998] 1 MLJ 89, at pp. 93-94 and 95, the High Court granted the originating summons but this decision was reversed by the Court of Appeal. According to NH Chan JCA: B

> Order 7 r. 3 of the Rules of the High Court 1980 ('the RHC') provides …
>
> *The instant originating summons does not contain any details of the questions on which Vijayalakshmi is seeking the court's determination or direction nor does it contain sufficient particulars so as to show what her cause of action is in respect of which she is asking relief or remedy*. Merely asking the court for an injunction against Saraswathy and her firm from acting in the four remaining civil suits under the Legal Profession Act 1976 or under its Rules is not enough. The originating summons must show why she or her firm should not act in the proceedings. *Since this is not shown, no cause of action is disclosed in the originating summons against Saraswathy. On this ground alone, the originating summons ought to have been dismissed.* C D
>
> (emphasis added); and E

(b) in *Lee Eng Eow v. Mary Lee & Anor* [1999] 3 CLJ 143, at pp. 149-150, NH Chan JCA decided as follows:

> And Order 7 r. 3(1) states: …
>
> *So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409). *Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed.": see Saraswathy Devi v. Vijayalakshmi Devi* [1998] 1 MLJ 89, at 96 *which is a decision of this court*. The words "cause of action" have been defined by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232, at 242 as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person". F G H
>
> *Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed. The originating summons itself does not disclose any reasonable cause of action against the company*. In any case, even if they have a cause of action against the company (which they have not), the respondents have not sued the company. They have sued a director of the company who is the wrong party to be sued. The judge below was wrong to have I

granted the orders sought by the respondents (plaintiffs). *We have allowed the appeal with costs here and in the court below with the result that the originating summons is dismissed.*

(emphasis added)

[43] The defendant also relies on the High Court judgment in *Kanciltek (M) Sdn Bhd*, at p. 260, in respect of the mandatory effect of O. 7 r. 3(1) RC. My own research reveals that the following High Court judgments have also decided that O. 7 r. 3(1) RC is a mandatory provision:

(a) *Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1996] 1 LNS 119; [1997] 1 MLJ 409, at pp. 416-417;

(b) *Salutary Avenue (M) Sdn Bhd v. Malaysia Shipyard and Engineering Sdn Bhd & Anor* [1999] 7 CLJ 514; [1999] 3 AMR 2659, at pp. 2683-2684;

(c) *Isyoda (M) Sdn Bhd v. Low Seong Tek* [2000] 4 CLJ 621; [2000] 1 MLJ 454, at pp. 459-460; and

(d) *Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd* [2001] 1 CLJ 132, at pp. 136-137.

[44] The above cases have interpreted O. 7 r. 3(1) RC whereby an originating summons has to fulfil either one of these two limbs:

(a) the OS should contain "a statement of the questions on which the (plaintiff) seeks the determination or direction of the court" (first limb); or

(b) the OS should state "a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy" (second limb).

[45] I have perused the OS in this case and I am satisfied that the OS has satisfied the first limb in respect of the following questions:

(a) whether the Australian Arbitral Awards can be recognised under s. 38(1) AA as binding and enforceable in the same manner as a judgment against the defendant; and

(b) whether a judgment in terms of the Australian Arbitral Awards can be entered against the defendant.

[46] As I have decided above, the OS need not disclose a cause of action. Hence, there is no necessity for the OS to comply with the second limb.

[47] Before leaving this topic, I have the following observations on the assumption that an originating summons does not comply with either the first or second limb:

(a) the above cases on the mandatory effect of O. 7 r. 3(1) RC, have been decided before the introduction of O. 1A and O. 2 r. 1(2) RC. I am of the respectful view that a mere breach of O. 7 r. 3(1) RC may be cured under O.1A and O. 2 r. 1(2) RC if there is no injustice caused to a defendant;

(b) even if an originating summons breaches O. 7 r. 3(1) RC, O. 18 r. 19(1) RC confers power on the court to allow the originating summons to be amended, instead of striking it out, as held by a judgment of the Court of Appeal delivered by Mahadev Shankar JCA in *Muniandy Subrayan & Ors v. Chairman and Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417; [1997] 1 MLJ 557, at 560 and 561. Such an option is clearly in the interest of justice when:

(i) the originating summons has not been heard;

(ii) any prejudice to the defendant may be remedied when the plaintiff amends the originating summons in compliance with O. 7 r. 3(1) RC; and

(iii) the defendant may be "compensated" in costs to be paid by the plaintiff.

The option of allowing the plaintiff to amend his or her originating summons has also been referred to by the Singapore Court of Appeal's judgment in *Kitnasamy s/o Marudapan v. Nagatheran s/o Manogar & Anor* [2000] 2 SLR 598. *Kitnasamy* concerns O. 7 r. 3(1) of the Singapore's Rules of Court (SRC) which reads as follows:

> Every originating summons **must** include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.
>
> (emphasis added)

It is to be noted that O. 7 r. 3(1) SRC is similar to our O. 7 r. 3(1) RC except that the Singaporean provision uses a "stronger" word "must" and yet, in *Kitnasamy*, at paras. 21-24, Chao Hick Tin JA decided as follows:

> 21. *The learned judge noted that a claim under s. 216 of the [Singapore's Companies Act] must be clearly pleaded together with specific allegations and in this case, neither the originating summons nor the summons-in-chambers indicated whether the application for the interim injunction was founded on s. 216. In any event, no other cause of action was pleaded.*

A

22. *Order 7 r. 3 of the Rules of Court provides …*

In our judgment, both these requirements of O. 7 r. 3 were satisfied. The headings of the originating summons and the summons-in-chambers read: 'In the Matter of Section 216 of the Companies Act, Chapter 50 Singapore Statutes, 1994 Edition and In the Matter of an agreement dated 1 November'. It was therefore clear that the appellant was founding a cause of action under s. 216 of the Act based on the agreement.

B

23. As for the question whether sufficient particulars had been furnished, it is necessary to look at the provisions of s. 216(1) of the Act: …

C

24. It is true that under this subsection, a member can ask for relief based on various grounds, namely, 'oppression', 'in disregard of his interest as shareholder', 'unfairly discriminates against (him)' or 'prejudicial' to him. But what is required of the applicant is that he should give sufficient particulars, namely, the facts. *We do not think it is necessary that he must identify one or more of the specific grounds spelt out in s. 216(1). And if this were necessary, we would have granted him leave to amend.*

D

(emphasis added); and

(c) Order 18 r. 19(1) and (3) RC provide the discretionary power for the court to dismiss and not merely to strike out a pleading, including an originating summons. Despite such a wide power, if there is a breach of O. 7 r. 3(1) RC and if the originating summons cannot be "saved" by an amendment, I am of the respectful view that the originating summons should only be struck out and should not be dismissed. The dismissal of the originating summons in *Saraswathy Devi* is understandable as the High Court has heard the case on its merits and the Court of Appeal is justified to reverse the High Court's decision in dismissing the suit. The judgment in *Lee Eng Eow* did not state whether a striking out application had been filed in that case or whether the hearing of the originating summons had been heard on its merits.

E

F

G

No Basis To Srike Out OS

[48] This court finds that the OS:

(a) is not scandalous, frivolous or vexatious within the meaning of O. 18 r. 19(1)(b) RC;

H

(b) does not prejudice, embarrass and/or delay any trial as understood in O. 18 r. 19(1)(c) RC; and

(c) does not constitute an abuse of court process under O. 18 r. 19(1)(d) RC, O. 92 r. 4 RC and/or the court's inherent jurisdiction.

I

[49] The above decision is premised on the following reasons: A

(a) the OS is based on the Australian Arbitral Awards;

(b) the defendant has not applied to the Australian court to set aside the Australian Arbitral Awards;

(c) the dismissal of defendant's suit fortifies the above decision that the OS should be allowed to stand; and B

(d) this is not a plain and obvious case to strike out the OS – the Supreme Court's judgment in *Bandar Builder Sdn Bhd*.

In the circumstances, this court is constrained to dismiss the defendant's striking out application with costs. C

Court's Jurisdiction To Recognise And Enforce Foreign Arbitral Awards

Malaysian Court Is Only An Enforcement Court And Not A Supervisory Court Over Foreign Arbitral Awards D

[50] In *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137; [2010] 2 MLJ 23, at pp. 28-29 and pp. 37-38:

(a) a sole English arbitrator gave an award in favour of the appellant company against the respondent company;

(b) the appellant company applied to the High Court to recognise and enforce the English arbitral award under the then applicable s. 27 of the Arbitration Act 1952 (1952 Act); and E

(c) Arifin Zakaria CJ delivered the majority judgment of the Federal Court as follows: F

> [42] *The next issue raised by the respondent is that the respondent was never a party to the arbitration agreement. In this regard, I agree with the submission for the appellant that if that is so, it is for the respondent to apply to the English Court, being the court having supervisory jurisdiction, to have the award set aside instead of raising the issue before our court, which is merely an enforcement court.* G
>
> [43] As observed by Coleman J in *A v. B & Ors (No 2)* [2007] 1 Lloyd's Rep 358:
>
> > *… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.* H
>
> [44] *In Sabah Gas Industries Sdn Bhd v. Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 396, it was similarly held that a party who had been given every opportunity to submit and to take part in arbitration proceedings in London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in Hebei* I

A *Import & Export Corp v. Polytek Engineering Co Ltd FAC V No 10 of 1988 (Hong Kong), the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before the court of enforcement.*

B [45] *For the above reasons, I am in agreement with the appellant's submission that this issue could not be raised in the court here being the court of enforcement. If at all the respondent wanted to raise the issue that the respondent was not a party to the arbitration agreement this must be done in the English courts as the supervisory courts.*

C (emphasis added)

[51] *Lombard Commodities Ltd* concerns s. 27 of the 1952 Act which reads as follows:

An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same
D effect, and, where leave is so given, judgment may be entered in terms of the award.

[52] Section 27 of the 1952 Act is different from ss. 38 and 39 AA. Nonetheless, I am of the view that *Lombard Commodities Ltd* applies to ss. 38 and 39 AA. In deciding whether to recognise and enforce foreign arbitral
E awards under ss. 38 and 39 AA, the court is merely an enforcement court which does not exercise any supervisory jurisdiction or power over foreign arbitral awards. Only the courts of the country which is designated the seat of arbitration, have supervisory jurisdiction and power over the arbitral award in question.

F **[53]** In this case, the defendant has not applied to the Australian court to set aside the Australian Arbitral Awards. Furthermore, the defendant's suit has been filed in this country in respect of the Australian Arbitral Awards and the defendant's suit has been subsequently dismissed by NCC 2 Court.

G **[54]** In *Open Type Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd* [2012] 1 CLJ 323, at 344 (*EFKO* case), Nalini Pathmanathan J (as Her Ladyship then was) described the court's function in relation to recognition and/or enforcement of a foreign arbitral award as follows:

The function of the court in relation to the enforcement of an Arbitration Award of
H *a foreign State has been well summarised in the Hong Kong case of Xiamen Xinjingdi Group Ltd v. Eton Properties Ltd & Anor* [2006] HKC 287 where Reyes J held:

... The court's role in an application for enforcement of a Mainland arbitral award under s. 2GG of the Arbitration Ordinance (Cap 341) was essentially that of an overseer. This 'overseeing essentially consists in ensuring that an
I *arbitration is conducted fairly and in lending the means at the court's disposal (for example, interlocutory injunctions, orders for security for costs, orders for the enforcement of an award as a Court judgment) to make an award effective.*

To that extent, I would wholly accept Gross J's observation that the Court should not second guess an arbitration award. Its role should be, although by no means entirely 'mechanistic', as 'mechanistic as possible'.

[53] *Although s. 2GG of the Arbitration Ordinance (Cap 341) is not pari materia with ss. 38 and 39 the underlying thread or principle remains the same, namely that the enforcing court ought to undertake any form of review of the arbitration award. The enforcing court should guard against attempts made to go behind the award or to argue or re-argue matters which have been comprehensively dealt with in the course of the arbitration. The provisions of s. 39, particularly the contravention of public policy argument ought not to be utilised as a guise to re-open settled matters in the arbitration. This the court ought to vigilantly guard against.*

(emphasis added)

Two-Stage Approach

[55] In *Agrovenus LLP v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2014] 4 CLJ 525, at pp. 532-534, Abdul Wahab Patail JCA decided in the Court of Appeal as follows:

[11] *It was submitted for the respondent that upon similar provision in Singapore, it was held in Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd [2010] SGHC 304, that there are two stages regarding the enforcement proceedings, with the first stage of enforcement pertaining to the initial grant of leave to enforce, and the second stage of enforcement pertaining to the stage where a party against whom an award was made resists the enforcement*, and that in *Denmark Skibstekniske Konsulenter A/S Likvidation v. Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661, the learned judge, at the first stage of the enforcement, determined if the arbitration clause in the standard conditions formed part of the new agreement before it can be satisfied that the arbitration had been produced as required by s. 30(l)(b) of the International Arbitration Act of Singapore and O. 69 r. 6(l)(a) of the Rules of Court 2012. *It was also held that in doing so, the court would take, as in Aloe Vera of America Inc v. Asianic Food (S) Pte Ltd [2006] 3 SLR 174, and Dardana Ltd v. Yukos Oil Co [2002] 2 Lloyd's Rep 326, a "mechanistic" or formalistic approach as to compliance with s. 38 of the Act, primarily to produce the original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof.* The submission for the respondent went on to discuss at some length the decision and principles in *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA 755, a decision of the Supreme Court of the United Kingdom, followed in *Strandore Invest A/S and Others v. Soh Kim Wat* [2010] SGHC 151 and *Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd* (*supra*).

[12] The High Court considered *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* (*supra*) at some length. The fact matrix of the case differs substantially from the present, and we do not think therefore that the present case necessarily warrants a consideration of which principles may be adopted and which may not.

A [13] *In our view, s. 38 reflects the obvious. An applicant for recognition or enforcement of an award must first satisfy the court that there is an award and an arbitration agreement that authorised it. That would show of the tribunal that made the award sought to be recognised and enforced is the tribunal referred to in the arbitration agreement. Although an objection as to jurisdiction of the arbitral tribunal could be argued on the basis of the terms* B *of the arbitration agreement, we accept that a formalistic approach to compliance with s. 38, by production of the copy of the award and the sale contract of 3 April 2009 relating to the transaction in dispute and containing an arbitration agreement suffices under s. 38 as prima facie proof.*

[14] *We held the view that the second stage is s. 39, which deals with the request* C *and grounds relied upon for refusal of the recognition or enforcement sought, and that this second stage is where questions relating to jurisdiction of the arbitral tribunal as well as whether, inter alia, the arbitral tribunal exceeded its jurisdiction or dealt with any dispute not contemplated or not falling within the terms of the submission to arbitration may properly be addressed.*

D [15] *We make the observation that the division under ss. 38 and 39 into two stages is to simplify the application for recognition or enforcement of an award and the process of dealing with exercise of discretion to refuse that application. This is consistent with recognition of such arbitrations as a specialised tribunal for resolution of commercial disputes or disagreements by those in commerce.*

E [16] *The respondent, in this case, is clearly the party against whom the recognition or enforcement of the award is invoked and who is requesting refusal. Section 39(1)(a) requires that it must satisfy the High Court with proof of any of the grounds set out in paras. (i) to (vii) thereof that it relied upon*. In this case, para. (ii) was relied upon.

(emphasis added)

F **[56]** In accordance with *Agrovenus LLP*, this court will embark on a two-stage inquiry as follows:

(a) the first inquiry (first inquiry) is a mechanistic or formalistic approach to ascertain whether the plaintiff has fulfilled all the following formal G requirements to recognise and enforce the Australian Arbitral Awards (formal requirements):

(i) whether Australia is a party to the New York Convention, a requirement under s. 38(4) AA;

H (ii) whether the plaintiff has produced duly authenticated original Australian Arbitral Awards or duly certified copies of the Australian Arbitral Awards within the meaning of s. 38(2)(a) AA and O. 69 r. 8(3) RC;

(iii) whether the plaintiff has produced the original arbitration agreement I or a duly certified copy of the arbitration agreement as required by s. 38(2)(b) AA and O. 69 r. 8(3) RC;

(iv) if the Australian Arbitral Awards or the arbitration agreement are not in our national language or English language, the plaintiff shall supply a duly certified translation of the Australian Arbitral Awards or arbitration agreement in the English language in accordance with s. 38(3) AA and O. 69 r. 8(3) RC; and

(v) whether the OS has stated:

(1) the name and the usual or last known place of abode or business of the plaintiff and the defendant as required by O. 69 r. 8(2)(a) RC; and

(2) either that the Australian Arbitral Awards have not been complied with or the extent to which the Australian Arbitral Awards have not been complied with at the date of the application (a requirement of O. 69 r. 8(2)(b) RC); and

(b) the second inquiry (second inquiry) is whether the Australian Arbitral Awards should not be recognised and/or enforced under any of the nine grounds stipulated in s. 39(1)(a)(i) to (vii), (b)(i) and (ii) AA (nine grounds of refusal).

[57] At this juncture, it is appropriate for me to comment that the two-stage inquiry to recognise and enforce an arbitral award, is based on a statutory basis, namely ss. 38 and 39 AA as well as O. 69 r. 8 RC. As such, no resort to the court's inherent jurisdiction (as relied on by the plaintiff in the OS) is necessary or desirable, especially in the light of a "minimalist" judicial intervention approach embodied in s. 8 AA (which will be discussed later in this judgment).

First Inquiry

[58] In *International Bulk Carriers SPA v. CTI Group Inc* [2014] 8 CLJ 854; [2014] 6 MLJ 851, at paras. 7-8, Hamid Sultan Abu Backer JCA decided in the Court of Appeal as follows:

[7] The two issues which are glaringly obvious are:

(a) …;

(b) *the second issue which is debatable is whether a part of the agreement is sufficient or the whole agreement inclusive of the enclosure is necessary for the purpose of registration is mandatory. On this issue the respondents despite our request was not able to produce any relevant authorities or point to assist the court.*

[8] We have read the appeal record and the submissions of the parties in detail. *We take the view the appeal should be allowed. Our reasons, inter alia, are as below*:

A (a) We have gone through the meticulous as well as commendable judgment of the learned judge and authorities relied for coming to the reasoned judgment. We are of the considered view that the authorities do not deal with the issues faced in the instant case.

B (b) *It is trite the parties relying on the provision of the AA 2005 must strictly comply with the provisions of the Act and more so when they are given exclusive privilege and benefit to register a foreign award which can only be challenged in a limited circumstances as set out in s. 39. The doors for registration cannot be widely opened by judicial fiat more so when it is not provided for by Parliament (see Taman Bandar Baru Masai Sdn*
C *Bhd v. Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83).

(c) *The plaintiff's argument that the setting aside the award can only take place pursuant to s. 39 of the Act does not have merit when there are flaws in the registration of the award under s. 38, more so when the mandatory*
D *requirement of s. 38 is not complied with on the face of the record. In consequence, an award registered under s. 38 can be set aside as of right if the conditions stated in the section is not satisfied and there is no obligation to make an application under s. 39 to set aside an award even though the applicant can satisfy one of the criteria in the said section. In addition, the law does not prohibit an application to be made both under*
E *s. 38 as well as 39.*

(d) *The registration of the award on facts of the instant case is ab initio a nullity and ought to be set aside as of right without any need for the defendant to rely on the provisos stated in s. 39* (see *Badiadin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).

F (emphasis added)

[59] It is clear from *International Bulk Carriers SPA* that the formal requirements are mandatory. If the recognition of any award fails to comply with one of the formal requirements, the recognition may be set aside by the court without the need for the defendant to rely on any one of the nine
G grounds of refusal.

[60] I have perused the cause papers for the OS and I am satisfied that the plaintiff has complied with all the formal requirements. Accordingly, the first inquiry is answered in favour of the plaintiff.

H *Second Inquiry*

Are Nine Grounds Of Refusal Exhaustive?

[61] Before embarking on the second inquiry, the first question which arises is whether the defendant may rely on a ground other than the nine
I grounds of refusal to resist successfully the recognition and/or enforcement of an arbitral award. I refer to the following cases:

(a) in *Honeywell International Middle East Ltd v. Meydan Group LLC (formerly Meydan LLC)* [2014] Bus LR Digest D13, at D14, Ramsey J in the English High Court held that the grounds to refuse recognition of an arbitral award as provided in s. 103 of the English Arbitration Act 1996 (1996 Act of UK) are exhaustive. Section 103 of the 1996 Act of UK provides as follows:

> 103 Refusal of recognition or enforcement.
>
> (1) *Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.*
>
> (2) *Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –*
>
> (a) *that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
>
> (b) *that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*
>
> (c) *that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
>
> (d) *that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));*
>
> (e) *that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;*
>
> (f) *that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*
>
> (3) *Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*
>
> (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
>
> (5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

A It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

(emphasis added)

B It is to be noted that s. 103(2)(a) to (f) and (3) of the 1996 Act of UK are substantially similar to our s. 39(1)(a)(i) to (vii), (b)(i) and (ii) AA; and

(b) Judith Prakash J in the Singapore High Court case of *Aloe Vera of America Inc v. Asianic Food (S) Pte Ltd & Anor* [2006] 3 SLR (R) 174, at pp. 195-196, decided as follows regarding s. 31 of the International Arbitration Act of Singapore (IAA):

C

46 *Mr Dhillon further submitted, and I agree, that it was difficult for Mr Loh's arguments to be sustained because s. 31(1) [IAA] expressly provided that "enforcement in any of the cases mentioned in subsections (2) and (4) may be refused but not otherwise". This language indicates that the grounds stated in s. 31(2) [IAA] are meant to be exhaustive and that the court has no residual discretion to refuse enforcement if one of those grounds is not established*. This is also the view taken by the authors of the section on Arbitration in *Halsbury's Laws of Singapore vol 2* (LexisNexis, 2003 Reissue) ("*Halsbury's*") at para 20.140.

D

E (emphasis added)

Section 31 IAA reads as follows:

Refusal of enforcement

F 31(1) *In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the party against whom the enforcement is sought may request that the enforcement be refused, and the enforcement in any of the cases mentioned in subsections (2) and (4) may be refused but not otherwise.*

G (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that:

(a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;

H

(b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;

I (c) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;

(d) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(3) When a foreign award referred to in subsection (2) (d) contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted.

(4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that -

(a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or

(b) enforcement of the award would be contrary to the public policy of Singapore.

(5) Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may and may —

(a) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and

(b) on the application of the party seeking to enforce the award, order the other party to give suitable security.

(emphasis added)

[62] I am mindful that s. 31(1) IAA has the additional words "but not otherwise" which are not present in s. 39(1) AA. Having said that, I am of the considered view that the reasoning in *Honeywell International Middle East Ltd* and *Aloe Vera of America Inc* applies to s. 39 AA. This interpretation is consistent with s. 8 AA which has been amended by the Arbitration (Amendment) Act 2011 (Act A1395). Section 8 AA reads as follows:

> **No court shall intervene in matters governed by this Act, except where so provided in this Act.**
>
> (emphasis added)

Section 8 AA provides for a "minimalist" approach by courts whereby judicial intervention in arbitral matters is only allowed if it is so provided in AA. If a ground is not provided in s. 39(1)(a) and (b) AA, the defendant cannot thus rely on such a ground. The "minimalist" approach enjoined by s. 8 AA has been explained in the following two Court of Appeal cases:

(a) in *Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 1 LNS 574; [2013] 6 MLJ 579, at pp. 588 and 589, David Wong JCA held as follows:

> The arbitration regime is now governed by [AA] which in our view dictates that the courts take a minimal interference approach and this is reflected in s. 18 [AA] which gives the arbitrator the power to rule on his own jurisdiction.
>
> The power was not present in the 1952 Arbitration Act. …
>
> Applying that spirit of minimal interference by the courts on matters relating disputes agreed to be resolved by arbitration, we make no further rulings on any other issues raised by the respective counsel in this appeal or the High Court. Those issues ought to be adjudicated by an arbitrator or arbitrators.
>
> (emphasis added); and

(b) Hamid Sultan Abu Backer JCA explained in *SDA Architects v. Metro Millenium Sdn Bhd* [2014] 3 CLJ 632, at pp. 655-656, as follows:

> [47] I have read the appeal records and the submissions of the learned counsel in detail. I am grateful to the comprehensive submissions. After much consideration to the submission of the learned counsel for the respondent, I am of the considered view that the appeal must be allowed. My reasons *inter alia* are as follows:
>
> (a) *It is well settled that the Scheme of AA 2005 is to almost prohibit the intervention of court relating to Arbitration Awards unless the Act specifically gives jurisdiction and power to intervene. In Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83, *while considering ss. 8, 42 and other provisions of AA 2005 I had made the following observations:*
>
> > *The AA 2005 must be seen to be a new chapter to the law, practice, and intervention of court etc in arbitration proceedings. The jurisdiction to ensure that courts do not intervene and meddle with arbitration proceedings is clearly set out in various provisions of the Act. Pre-2005 cases which provide room for interference with arbitrator's decision must now be treated as otiose, as AA 2005 has been shrewdly worded to ensure that courts ordinarily do not interfere with arbitration awards.*

I will say that draftsmen of provisions such as ss. 8, 9, 37 and 42 have with great ingenuity asserted that court should not interfere with arbitrator's award without out rightly saying so. If they have said so out rightly, it will stand to be unconstitutional. Thus, it will appear that it is going to be difficult to frame any question of law pursuant to AA 2005 when the subject matter of complaint is one which is restricted by ss. 9, 37, or 42 etc. It is now for the courts themselves to restrain from interference unless it is a case of patent injustice which the law permit the court in clear terms to intervene. It is trite that AA 2005 is meant to promote onestop adjudication. In *Lesotho Highland Development Authority v. Impregilo Spa* [2005] UKHL 43, Lord Steyn sitting in the House of Lords had this to say:

> *I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the [1996 Act of UK], which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed; it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the [1996 Act of UK] would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.*
>
> *The moral of the story is that once parties have agreed to arbitration agreement they must be prepared to be bound by the decision and refrain from approaching the court to give hair splitting decision arising from ingenious arguments which often results in erroneous judgments not anticipated by Parliament. Constant interference of the court as was the case in the past will defeat AA 2005 which is for all intent and purpose to promote one-stop adjudication in line with International mandate.* (emphasis added)

(emphasis added)

In view of my adoption of *Honeywell International Middle East Ltd* and *Aloe Vera of America Inc*, the nine grounds of refusal are exhaustive. Hence, the defendant cannot rely on any ground which is not stipulated in s. 39(1)(a) and (b) AA, to persuade this court to refuse recognition and/or enforcement of the Australian Arbitral Awards.

Burden Of Proof

[63] In *Agrovenus LLP*, at p. 534, the Court of Appeal held that the burden to prove any of the seven grounds in s. 39(1)(a)(i) to (vii) AA lies with the defendant.

[64] In *EFKO* case, at p. 336, Nalini Pathmanathan J (as Her Ladyship then was) decided as follows:

> [30] *The plaintiff here has complied with the formal requirements set out in s. 38.* The Arbitration Award was made in a state which is a party to the New York Convention as the Russian Federation is one of the signatory states to the convention with effect from 29 December 1958.
>
> [31] *Given the foregoing, and the express words of s. 39 of the Act, the onus of proof now shifts to the defendant who opposes the recognition and enforcement of this Arbitration Award to satisfy the court why the award should not be registered and enforced.* In *Law, Practice and Procedure of Arbitration – The Arbitration Act 2005 Perspective* [2009] 2 MLJ cxxxvi; [2009] 2 MLJA 135 by Sundra Rajoo the learned author stated:
>
> > Section 39 – Grounds for refusing recognition or enforcement This section provides grounds for refusal of recognition of an award. The grounds follow closely the grounds laid down in section 37 for setting aside an award. The applicant has to comply with the formal requirements, after that the onus of providing proof shifts to the party opposing recognition and enforcement.
>
> [32] (see also *Ngo Chew Hong Oils & Fats (M) Sdn Bhd v. Karya Rumpun Sdn Bhd* [2009] 1 LNS 1321 where Hamid Sultan Abu Backer J held:
>
> > *... The burden of proof why the recognition and enforcement of the arbitration award should be refused lies with the defendant. This is a strict requirement as set out in section 39 of AA 2005. The defendant failed to satisfy the said requirement. And real proof is required to be shown, before the court can dismiss the plaintiff's application.*
>
> (emphasis added)

[65] The English High Court in *Honeywell International Middle East Ltd*, at p. D14, held as follows:

> *The burden of establishing the grounds set out in s. 103(2) [1996 Act of UK] was on the defendant, although the court could raise matters under s. 103(3) of its own motion.*
>
> (emphasis added)

Section 103(2) and (3) of the 1996 Act of UK are similar to our s. 39(1)(a) and (b) respectively. The difference in wording between s. 39(1)(a) and (b) supports the above *dicta* in *Honeywell International Middle East Ltd*. With respect, I am not inclined to accept that the court may act of its own motion under s. 39(1)(b)(i) and (ii) AA. If the court may act *suo motu* under

s. 39(1)(b)(i) and (ii) AA, this is contrary to the "minimalist" approach embedded in s. 8 AA and explained by the Court of Appeal in *Capping Corp Ltd* and *SDA Architects*. The above Malaysian cases have clearly held that once the plaintiff fulfils all the formal requirements, the legal onus shifts to the defendant to prove any one of the nine grounds of refusal. If the defendant is unable to discharge such a legal burden, the court has no discretion but to recognise and enforce the Australian Arbitral Awards under s. 38(1) AA.

Can Defendant Rely On Any One Of Nine Grounds Of Refusal In This Case?

[66] The defendant forwarded the following three contentions (defendant's three contentions) to persuade this court not to recognise and/or enforce the Australian Arbitral Awards:

(a) the plaintiff is not a party to the supply agreement which contains the arbitration agreement. Consequently, the Australian Arbitrator has no jurisdiction to make the Australian Arbitral Awards and the defendant may challenge the recognition and enforcement of the Australian Arbitral Awards on the ground of lack of jurisdiction on the part of the Australian Arbitrator (issue regarding Australian Arbitrator's lack of jurisdiction);

(b) the defendant also avers that the defendant's liability and quantum of damages have not been proven by the plaintiff (issues regarding defendant's liability and extent of liability); and

(c) the plaintiff has failed to allow the defendant to do the rectification work and as such, the plaintiff has failed to mitigate its loss (plaintiff's alleged failure to mitigate loss).

The following cases have been relied on by the defendant (in the order these cases were presented in the defendant's written submission):

(i) my previous decision in *Paramasivam Karuppannr Gounder v. PT Synergy Oil Nusantara, Indonesia* [2014] 2 AMCR 937;

(ii) *International Bulk Carriers SPA*;

(iii) the High Court's judgment in *Maimunah Deraman v. Majlis Perbandaran Kemaman* [2011] 9 CLJ 689; and

(iv) the High Court's decision in *Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655.

[67] Firstly, I hold that the defendant's three contentions do not fall within any of the nine grounds of refusal. For reasons explained above, I am of the view that the nine grounds of refusal are exhaustive under s. 39(1)(a) and (b) AA. Accordingly, I cannot accept the defendant's three contentions to refuse recognition and enforcement of the Australian Arbitral Awards.

[68] Secondly, I am not able to accept the defendant's three contentions for the following reasons:

(a) in accordance with the Federal Court's judgment in *Lombard Commodities Ltd* (which is binding on me as a matter of *stare decisis*), this court does not possess any supervisory jurisdiction and power under AA to inquire into the validity and correctness of the Australian Arbitral Awards. In fact, in *Lombard Commodities Ltd*, the respondent company had raised the same argument that the respondent company was not a party to the arbitration agreement in question; and

(b) the defendant should have applied to the Australian courts to review and challenge the validity and correctness of the Australian Arbitral Awards based on the defendant's three contentions. Surprisingly, the defendant's suit was filed in Malaysia and not in Australia. I must add that the dismissal of defendant's suit has been rightly made.

[69] The Singapore High Court case of *Aloe Vera of America Inc* bears a striking similarity to this case. The background in *Aloe Vera of America Inc*, at p. 177 and 179-180, is as follows:

> 1. *The plaintiff, Aloe Vera of America Inc ("AVA"), took out this originating summons in June 2004 in order to obtain leave to enforce the Final Arbitration Award No 50 T 199 0092 03 issued on 15 October 2003 ("the Award") against Asianic Food (S) Pte Ltd ("Asianic"), the first defendant named in the summons and Chiew Chee Boon (also known as Steven Chiew), the second defendant*. The application proceeded on an *ex parte* basis, as usual, and an order in terms was made against both defendants on 25 June 2004. They were subsequently served with the order and the supporting papers.
>
> 2. On 23 July 2004, *Mr Chiew applied to set aside the order*. …
>
> 7. *Mr Chiew was upset to be named a party to the arbitration. He took the position that he was not a party to the Agreement and had not agreed to arbitration or to the laws of Arizona applying to him personally. He appointed a law firm called Sullivan Law Group to act on his behalf to object to the arbitration. On 21 July 2003, Sullivan Law Group sent a position statement to the Arbitrator in which it was made clear that Mr Chiew was not submitting to the jurisdiction of the Arbitrator and that he was not a party to the arbitration agreement. AVA's lawyers responded and submitted that Mr Chiew was a party to the arbitration agreement pursuant to cl. 13.7 of the Agreement and/or that he was the alter ego of Asianic. On 1 August 2003, the Arbitrator made a preliminary order. He found that he had jurisdiction over Mr Chiew pursuant to cl 13.7 of the Agreement because Mr Chiew was properly a party to the arbitration under the broad definition found in cl. 13.7 of the Agreement. He also stated that he had reached that result without deciding whether Mr Chiew was also properly before the tribunal under the alter ego claim.*
>
> 8. *In a letter to the Arbitrator dated 10 September 2003, Sullivan Law Group stated that Mr Chiew disagreed with the Arbitrator's order. Thereafter, Mr Chiew took no further part in the arbitration proceedings.*

9. *On 15 September 2003, the Arbitrator conducted a hearing. Prior notice of this hearing was given to all parties and they were asked to attend with their witnesses and to be prepared to present their proofs of evidence. Mr Chiew and Asianic did not attend.*

10. *The Arbitrator issued the Award on 15 October 2003. Pursuant to the Award, the Arbitrator ordered Asianic and Mr Chiew to pay to AVA …*

11. *In September 2003, Mr Chiew filed an originating summons in this court (Originating Summons No 1276 of 2003) in which he sought a declaration that he was not a party to the Agreement. He obtained leave to serve these proceedings on AVA out of jurisdiction but AVA subsequently made a successful application for that order to be set aside. On appeal, Mr Chiew failed to have the order reinstated.*

(emphasis added)

The Singapore High Court rejected Mr Chiew's contention that the American arbitrator had no jurisdiction because Mr Chiew was not a party to the agreement in question. According to the Singapore High Court, at pp. 196, 198 and 200:

47. *Whilst I have noted Mr Chiew's arguments that he was not a party to the arbitration agreement, I do not think that it is correct for a court that is asked to enforce an award under the [New York Convention] to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the [New York Convention] grounds during the second stage of the enforcement process. It is indisputable that in holding that Mr Chiew was a party to the arbitration agreement, the Arbitrator was acting within his jurisdiction. It is an accepted principle of arbitration law that an arbitral tribunal has jurisdiction to determine whether a particular person is a party to an arbitration agreement. This is referred to as the doctrine of Kompetenz-Kompetenz and is not contested by Mr Loh whose submissions state that an arbitral tribunal has power to rule on its own competence and to continue with the arbitration if it considers itself competent to do so*. In this particular case, there is also, under the applicable rules of the AAA, a specific rule (Art 15(1)) that states that the tribunal has power to rule on its own jurisdiction "including any objections with respect to the existence, scope or validity of the arbitration agreement".

48. The Arbitrator was acting under the rules of the AAA. *He reached his decision based on the law of Arizona, the law that was provided by the Agreement to be the law governing the relationship between the parties. He held that he had jurisdiction to determine the arbitrability of the claim by AVA against Mr Chiew and, secondly, that Mr Chiew was a proper party to the arbitration. Whilst it is also accepted that the power of the arbitral tribunal to determine its own jurisdiction is subject to review by the court, the issue in a situation like this is which court should conduct such review. Should it be the court that supervises the arbitration, ie, the court of the jurisdiction of the seat of the arbitration or should it be the court that is asked to enforce the award in a different jurisdiction? The Svenska Petroleum case ([24] supra) indicates that the English courts take the view that the answer to this question is that the supervisory court is the only one entitled to review the decisions of the arbitrator. …*

A 52. In the present case, the preliminary order on Mr Chiew's position was made by the Arbitrator on 1 August 2003 and the Award was rendered on 15 October 2003. *Up to the date of this hearing, Mr Chiew had not challenged either of those determinations in the Arizona Court. It was clear from the submissions made on his behalf that Mr Chiew had chosen not to challenge the Award in the Arizona Court and that he knew that he was entitled to mount such a challenge in* B *that forum. …*

56. The fact that the Award may be final in Arizona does not therefore mean that Mr Chiew is excluded or precluded from resisting enforcement in Singapore. *He may still resist enforcement of the Award provided that he is able to satisfy one of the [New York Convention] grounds under s. 31(2) [IAA]. The* C *grounds on which enforcement of an award may be resisted under the [IAA], however, are not the same grounds that would entitle Mr Chiew to set aside the Award in the jurisdiction of the supervisory court. Whilst Mr Chiew's options may be cumulative, that does not mean that the bases on which the options may be exercised are or must be identical. Mr Chiew could have challenged the Award in Arizona on the basis that the Arbitrator had no jurisdiction to make the Award because* D *Mr Chiew was not a party to the arbitration agreement. He may be able to resist enforcement here if he can establish that the arbitration agreement was "not valid under the law to which the parties have subjected it" within the meaning of that phrase in s. 31(2)(b). He is not, however, entitled to object to the initial grant of leave to enforce on the basis that the Arbitrator erred in holding that he was a party to the arbitration. As the enforcement court, I can only permit Mr Chiew to resist* E *enforcement if he is able to establish one of the grounds set out in s. 31(2) [IAA]. Except to the extent permitted by those grounds, I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court. As Mason NPJ also pointed out in the Hebei case, a party may be precluded by his failure to raise a point before the* F *court of supervisory jurisdiction from raising that point before the court of enforcement. This is because failure to raise such a point may amount to an estoppel or a want of bona fides such as to justify the court of enforcement in enforcing an award. This, in fact, is what happened to the Government of Lithuania in the Svenska Petroleum case.*

(emphasis added)

G Based on *Aloe Vera of America Inc*, I decide as follows:

(a) the Australian Arbitrator has the competence to decide in accordance with Australian law that the Australian Arbitrator has the jurisdiction to arbitrate any dispute arising from the supply agreement in respect of the H defendant. Furthermore, the defendant has not discharged its legal burden by adducing an affidavit containing an expert's opinion on Australian law, in particular Western Australian law (the seat of arbitration is in Western Australia), to show that the Australian Arbitrator has no jurisdiction to arbitrate any dispute arising from the I supply agreement concerning the defendant consequently, the issue regarding Australian Arbitrator's lack of jurisdiction does not persuade this court to refuse recognition and/or enforcement of the Australian Arbitral Awards; and

(b) this court cannot consider the merits of the Australian Arbitral Awards. Nor can the court allow the defendant to raise any issue which the defendant could have raised before the Australian Arbitrator or the Australian supervisory courts. The issues regarding defendant's liability and extent of liability as well the plaintiff's alleged failure to mitigate loss, concern the merits of the Australian Arbitral Awards which this court cannot consider.

[70] The cases cited by the defendant may be distinguished from this case as follows:

(a) *Paramasivam Karuppannr Gounder*, at paras. 8-10 and 16, concerned an appeal to the High Court under s. 18(8) AA against a domestic arbitral tribunal's ruling that the tribunal had jurisdiction to arbitrate the dispute in question;

(b) as explained above, in *International Bulk Carriers SPA*, at paras. 7-8, the plaintiff had failed to comply with the formal requirements;

(c) in *Maimunah Deraman*, at pp. 692-693, the plaintiff architect referred questions of law arising from a domestic arbitral award to the High Court under s. 42(1) AA; and

(d) *Lembaga Kemajuan Ikan Malaysia*, at p. 658, decided a reference of questions of law arising from a domestic arbitral award under s. 42(1) AA.

[71] Based on the above reasons, I conclude the second inquiry in the plaintiff's favour.

Non-Application Of s. 37 AA

[72] The OS does not concern an application to set aside an arbitral award under s. 37(1) AA. As such, the following cases do not apply in respect of the OS:

(a) the Court of Appeal's judgment in *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420; [2009] 6 MLJ 795;

(b) the Court of Appeal's decision in *Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao Peoples's Democratic Republic* [2014] 1 LNS 525; and

(c) the High Court case of *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV* [2013] 3 CLJ 294.

Application Of O. 69 r. 8(7)(a), (b) and (8) RC

[73] As the two-stage inquiry has been resolved in favour of the plaintiff, I am bound to give permission to the plaintiff to enforce the Australian Arbitral Awards (court's permission).

[74] After I had delivered my oral judgment giving the court's permission, the plaintiff's learned counsel opined that there was no necessity for this court to grant prayer (b) in the OS (a judgment in terms of the Australian Arbitral Awards be entered against the defendant upon the expiry of 14 days from the service of the court's permission) (prayer (b)) because this court had earlier dismissed the defendant's striking out application.

[75] Despite this court's earlier decision to dismiss the defendant's striking out application, prayer (b) should be granted as a consequence of the court's permission. My reasons are as follows:

(a) Order 69 r. 8(7)(a) RC confers a right on the defendant to set aside the court's permission if the defendant applies to do so within 14 days from the date of the court's permission or within such other period as specified by court (defendant's setting aside application). Such a right conferred on the defendant is fortified by the wording in O. 69 r. 8(8) RC. The only exception when the court's permission applies immediately is provided in O. 69 r. 8(10) RC regarding enforcement of arbitral awards in the nature of interim injunctions. It is true that in view of this court's dismissal of the defendant's striking out application, the defendant may be barred by the doctrine of issue estoppel (please see Peh Swee Chin FCJ's judgment in the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at pp. 197-198, 198-199 and pp. 199-200, regarding the wide application of the issue estoppel doctrine) from succeeding in the defendant's setting aside application. Notwithstanding the possible application of the issue estoppel doctrine and the possible low prospect of success in the defendant's setting aside application, the dismissal of the defendant's striking out application cannot nullify the defendant's right under O. 69 r. 8(7)(a) and (8) RC to file the defendant's setting aside application; and

(b) Order 69 r. 8(7)(b) RC provides that the Australian Arbitral Awards "shall" not be enforced until:

(i) after the expiry of the fourteen-day period; or

(ii) if the defendant's setting aside application has been filed, until after the final disposal of the defendant's setting aside application.

Order 69 r. 8(7)(b) RC seems to be a mandatory provision from the use of the word "shall" in that provision (please see the Federal Court's judgment in *Public Prosecutor v. Yap Min Woie* [1995] 4 CLJ 692; [1996] 1 MLJ 169, at pp. 172-173, regarding the mandatory effect of the word "shall"). Such a mandatory provision cannot be waived or abrogated by this court's dismissal of the defendant's striking out application.

Court's Decision

[76] Based on the above reasons:

(a) the defendant's striking out application is dismissed with costs; and

(b) the OS is allowed with costs and the following orders are made:

(i) the Australian Arbitral Awards are recognised as binding and enforceable in the same manner as a judgment against the defendant;

(ii) judgment in terms of the four Australian Arbitral Awards be entered against the defendant upon the expiry of 14 days from the service of this order on the defendant; and

(iii) interest at the rate of 5% per annum on the sums in terms of the four Australian Arbitral Awards from the date of the judgment (to be entered as provided above) to the date of full settlement of those sums.

[77] In closing, I must thank learned counsel for both parties for their helpful written and oral submission which has assisted me in the preparation of this judgment.